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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1485

THOMAS J. HILLIGOSS and KAY BERRYMAN,
On Behalf of Themselves and All Others Similarly Situated,
Appellants,

vs.

ARTHUR J. LADOW, As Mayor of the City of
Kokomo, Indiana, Et Al.,

Appellees.

GERALD SWING and MARGARET TOMLINSON,
On Behalf of Themselves and All Others Similarly Situated,
Appellants,

vs.

ARTHUR J. LADOW As Mayor of the City of
Kokomo, Indiana, Et Al.,

Appellees.

APPEAL FROM THE COURT OF APPEALS
OF INDIANA, SECOND DISTRICT.

BRIEF

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**BRIEF IN SUPPORT OF MOTION TO
DISMISS OR AFFIRM**

I. Facts

This is an appeal from the decision of the Court of
Appeals of Indiana upholding a determination by the

Howard County Superior Court denying in part plaintiffs' class action petition for mandate seeking to compel the Board of Trustees of the Police Pension Fund and the Board of Trustees of the Firemen's Pension Fund of the City of Kokomo, Indiana to increase certain pensions for retired policemen, firemen, their widows and dependents, by including in the base for the calculation of the pension benefits certain fringe benefits that had not before been considered as part of the pension base.

The police and firemen's pensions for the City of Kokomo, Indiana were created by statute in 1937 (IC 19-1-24-1 et seq. and IC 19-1-37-1 et. seq. hereinafter referred to as the "Pension acts"). The amount of the benefits was based upon a percentage of the "monthly wage" or "salary" of active firemen and upon the "monthly pay" or "salary" of active policemen.

The City of Kokomo interpreted the language of the Pension acts as not including certain fringe benefits such as optional matching health insurance premiums, or clothing and equipment allowances, within the definition of the terms "monthly wage", "monthly pay", or "salary" for the purpose of calculating pension benefits. From 1937 until this action was initiated, those fringe benefits were not included in the calculation of pension benefits under the Pension acts.

This action was filed as a mandate action seeking to compel the city of Kokomo to change this long-standing interpretation of the Pension acts by altering the definition of "monthly pay", "monthly wage", and "salary" for the purpose of increasing those pensioners' benefits. Upon trial of this matter the Howard Superior Court issued its ruling finding that the optional matching health insurance premium program of the City of Kokomo did not constitute "wages" or "salary" within the meaning of the Pension acts, nor did the clothing and equipment allowance provided to

active police and firemen fall within the meaning of those terms as they are used in the Pension acts.

Following the perfection of the appeal of the Howard County Court decision, the Indiana General Assembly amended the Pension acts in order to attempt to clarify the legislative intent of the prior law by stating:

"...it has never been the intention of the General Assembly that remuneration or allowances for fringe benefits, incentive pay, holiday pay, insurance, clothing, automobiles, firearms, education, overtime or compensatory time off be used in the calculation of benefits under IC 18-1-12, IC 19-1-18, IC 19-1-24, IC 19-1-25-4 or IC 19-1-37..." (IC 19-1-46, hereinafter referred to as the "Amendment")

The Amendment also defined the term "salary" as used in the Pension acts to exclude remuneration or allowances for fringe benefits, incentive pay, holiday pay, insurance, clothing, automobiles, firearms, education, overtime or compensatory time off.

II. Argument

It is conceivable that a federal question could arise if the Court of Appeals of Indiana had first found that these fringe benefits were included within the definition of "salary" for the purpose of calculating the pension base under the Pension acts, but that the Amendment was binding on the Court and removed those benefits. However, the Court of Appeals of Indiana did nothing of the kind. The Court specifically found the Amendment *not* to be binding upon the Court in determining what pension benefits were intended in the original act. The opinion denies that the Court could even allow a subsequent legislative expression to *influence* its judicial determination, if the plain language of the Pension act had expressed a contrary meaning.

The Court then found that its independent evaluation of the statutory language of the Pension acts demonstrated both that the language was ambiguous, and therefore a proper subject for judicial interpretation, and that the intent of the legislature as indicated by the language of the statute was not to include such fringe benefits in the calculation of the pension base.

The petitioner would have this Court believe that the fringe benefits in question were considered to be "salary" for the purpose of calculating the pension base for the City of Kokomo until that base was altered by the legislature's adoption of the Amendment to the Pension act. Nothing could be further from the truth. Since the Pension act was passed in 1937, pensioners in the City of Kokomo have never received pensions which included the questioned fringe benefits in the pension base.

As important as the parties' interpretation of the contract since 1937, however, is the ruling of the trial court. *Before* the Amendment was enacted, the Howard County Superior Court held that the fringe benefits in question did not fall within the meaning of "salary" for the purpose of the Pension act. That decision meant that at the time the Amendment was passed, it had already been judicially determined that the proper construction of the pension statute excluded optional matching health insurance premium benefits and clothing and equipment allowances from the determination of the pension base.

The rationale of that decision is set forth in the opinion of the Howard County Superior Court, which is attached to petitioners' jurisdictional statement. Little purpose would be accomplished by reviewing that decision other than to note that the matter was resolved as a matter of relatively routine interpretation of an obviously ambiguous provision of the Pension acts as it would apply to the fringe benefits involved.

Arguments can be made that the legislature should have chosen to include all fringe benefits in the calculation of the pension base. Arguments can also be made that the ambiguity in the original statute could have been resolved in favor of the petitioners' position, instead of to the contrary. However, it is not the function of the Supreme Court of the United States to review a state court's interpretation of a state statute simply because a contract is involved. It is only legislative action, and not judicial, which can form the basis for an impairment of contract and create a federal constitutional question.

"As this court has repeatedly ruled, the Constitution affords no protection as against an impairment by judicial decision." *Columbia R. and Electric Company v. South Carolina* 261 U.S. 236, 67 L. Ed. 629, 43 Sup. Ct. Rep. 306 (1923).

The petitioner is simply asking the Supreme Court of the United States to substitute its judgement for that of the legislature and courts of the State of Indiana concerning what petitioners feel should have been included in the firemen's and policemen's pension base in the City of Kokomo. It is the job of the state courts in the State of Indiana to determine the intent of the Indiana legislature and to judicially construe the 1937 Pension acts. No federal question justifying the intervention of the United States Supreme Court is created simply because the petitioners wish the courts had construed the Pension acts differently.

Had the legislature done nothing at all to clarify the ambiguity in the Pension acts, the Court of Appeals of Indiana would simply have affirmed the decision of the Howard County Superior Court on the same grounds that are stated in the opinion of the Court of Appeals of Indiana, which opinion is also attached and made a part of the petitioners' jurisdictional statement. The matter so concluded would have obviously raised no federal question

and this appeal, if pursued, would be dismissed as a matter of course.

The passage of the Amendment and the mention of the Amendment in the opinion of the Court of Appeals of Indiana does not alone allow the petitioner to make a claim that the Amendment constituted a legislative impairment of a vested contract right. A reading of the opinion of the Court of Appeals of Indiana demonstrates quite conclusively that the Amendment was not the basis of the Court's ruling, which was instead based upon the same type of analysis of the language of the original Pension acts which resulted in the trial court's finding that the fringe benefits in question did not form a part of the pension base under the language of the statute as it was originally written. While the opinion cites the Amendment, its comments concerning the proper use and consideration of the Amendment make it quite clear that it was not given the effect the petitioner claims.

"The expression of a subsequent legislature's opinion as to the proper construction of a statute passed by a previous legislature has no judicial force. The reasons behind this rule as presented in *Bettenbrock v. Miller* (1916) 185 Ind. 600, 112 N.E. 771, are worth restating. First and foremost, the responsibility for construing doubtful statutes is a judicial power which is vested exclusively in the courts of the state. Legislative interference with that judicial function is prohibited by the Indiana Constitution, Article 3, Section 1. It is furthermore the intent of the legislature that passed the act which the Court seeks to ascertain, not the intent of a subsequent legislature."

"A subsequent legislative expression cannot control or influence the judicial determination when the plain language of the statute expresses a contrary meaning. *Bettenbrock v. Miller, supra*. (185 Ind. at 607) 112 N.E. at 774. Otherwise, particularly in a case such as this,

there is the danger that the subsequent legislation may impair vested rights. *Klamm v. State ex. rel. Carlson* (1955) 235 Ind. 289, 292-93, 126 N.E. 2d 487, 489."

These statements are in stark contrast to the State Court finding in *Columbia R. Gas and Electric Company v. South Carolina* that the subsequent legislation was binding upon the Court.

Following the Court's acknowledgement that the statute cannot be given binding effect, the Court goes on to find that the language of the Pension acts compels the same conclusion.

"More importantly, the statutory language in force at the time dictates the conclusion that salary is used in a restricted sense and does not include the City's contributions to the group insurance plan."

In attempting to demonstrate that the decision of the Court of Appeals of Indiana was based upon the Amendment and not upon an interpretation of the original pension acts, the petitioner is forced to resort to tricks of editing to make their description of the opinion read far differently from the opinion itself. Petitioner cites at the top of page 15 the following language from the Court of Appeals' opinion which petitioners put forth as an indication that the basis of the decision of the Court of Appeals was the Amendment, not the language of the Pension acts themselves.

"Fortunately, we are not without some guidance in ascertaining which of these alternative approaches the General Assembly intended to adopt. Subsequent to the perfection of this appeal, the Indiana General Assembly amended the Pension statutes in several respects pertinent to the issues under consideration here."

The petitioner omitted to note that the "guidance" referred to by the Court in that portion of the opinion was not limited to the enactment of the Amendment, as the

quote out of context would indicate. It is placed into context in the sentence immediately following the brief discussion by the Court of why the legislative declaration is *not* binding upon it. The Court then goes on to state:

"More importantly, the statutory language in force at the time dictates the conclusion that salary is used in a restricted sense and does not include the City's contributions to the group insurance plan."

Even if we were to assume that it would be improper for the Court to find "guidance" from the enactment of the Amendment, (which we do not concede) the language of the decision makes it clear that the same "guidance" was also derived from the language of the Pension acts as they were originally passed.

The same game is played with respect to the subsequent paragraph on Page 15 of petitioners' brief where it is represented that the conflicting earlier opinion of the Attorney General was rejected by the Court of Appeals on the grounds that "the recent legislative amendments to the Pension provisions indicate just the opposite."

The meaning of the language cited is severely distorted by the petitioners' omission of the intervening sentence. The Court was not citing the Amendment as an indication that the Attorney General's position should be rejected. It was citing the Amendment to demonstrate that an argument cannot be made that the legislature acquiesced in the Attorney General's interpretation by failing to take action following its publication. The full quote is as follows:

"We are aware that an official opinion of the Attorney General expresses a contrary interpretation. 1973 OAG No. 35, page 108. However, such opinions are not judicially binding and there is no indication here that the General Assembly meant to acquiesce in the construction given by the Attorney General. (Cities omitted) The recent legislative amendments to the pension provisions indicate just the opposite."

It is clear from the language of the opinion of the Court of Appeals of Indiana that the Court did not give effect to the allegedly unconstitutional Amendment, but simply agreed with the opinion of the trial court that the Pension acts when passed did not intend to include clothing and equipment allowances or optional health insurance premium programs as a part of the pension base. Since the decision was reached without reliance upon the Amendment, no federal question of legislative impairment of contract exists for the Court to review.

"If the judgement of the state court gives no effect to the subsequent law of the state, and the state court decides the case upon grounds independent of that law, a case is not made for review by this court upon any ground of the impairment of a contract." *Bacon v. Texas*, 165 U.S. 207, 216, 41 L. Ed. 132, 136, 16 Sup Ct. Rep. 1023.

Petitioners recognize that the Indiana Court's decision is stated to be based upon an analysis of the original Pension acts, and not the Amendment. They attempt to avoid that complication by noting that the Supreme Court of the United States may choose to ignore the state grounds for a decision if it is apparent that the non-federal basis of the decision is "so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question." *Enterprise Irrigation District v. Farmers Mutual Canal Company*, 243 U.S. 157, 164, 37 Sup. Ct. Rep. 318.

The absurdity of that position in this case, however, is evident by the fact that the decision of the Court of Appeals was a decision *upholding* the interpretation of the Pension acts made by the trial court. Since the trial court made its interpretation of the Pension acts adversely to the petitioner *before* the Amendment was enacted, it is obvious that the trial court decision was not "a mere device to

prevent review" of a real intention to give effect to an act not yet in existence. Unless the Court chooses to characterize the finding of the Howard County Superior Court, the Court of Appeals of Indiana and the Indiana Supreme Court as to the proper interpretation of the Pension acts as being so clearly wrong as to be disregarded as "essentially arbitrary", then the non-federal ground of the decision is sufficient to preclude Supreme Court review.

Even if upon review of the opinions of the Howard County Superior Court and the Court of Appeals this court should feel that it might have reached an opposite conclusion as a matter of first impression, it is inconceivable that this court could evidence so little respect for the state courts prerogatives as to find a construction acquiesced in by the parties for forty years and upheld by two tribunals of the state to be so clearly wrong as to be properly ignored as "essentially arbitrary" in order to find the existence of a federal question to review.

The petitioner has had his day in court before the trial court, Court of Appeals and Supreme Court of the State of Indiana. He has been unsuccessful in all three forums in convincing the courts of this state that the original Pension Act should not continue to be interpreted as the City of Kokomo has interpreted it for the past forty years. The asserted constitutional question is a transparent attempt to find yet one more court and one more opportunity for the petitioner to pursue its claim to be entitled to that which neither the legislature nor judiciary of the State of Indiana presently intends or ever intended to provide in pension benefits. No federal constitutional questions lay at the base of any of the decisions in the state courts of Indiana. No substantial federal question presently exists which would justify the exercise of the jurisdiction of the Supreme Court of the United States.

III. Conclusion

The court should dismiss this appeal on the grounds that no federal question is involved and/or that the decision appealed from rests firmly upon an adequate non-federal ground for support.

Respectfully submitted,

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